84-92

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EL PASO COUNTY COMMUNITY COLLEGE DISTRICT, et al.,
Petitioners,

v.

PROFESSIONAL ASSOCIATION OF COLLEGE EDUCATORS, TSTA/NEA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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85-RP

QUESTIONS PRESENTED

1. Whether the court below erred in not considering and balancing the interest of the College in its governing process against the interest of the plaintiff in free association.

2. Whether the court below erred in its conclusion that *Mt. Healthy v. Doyle* precluded an examination of an administrative record to determine if substantial and sufficient reasons existed, as a matter of law, for plaintiff's employment termination.

3. Whether the court below erred in concluding that *Mt. Healthy v. Doyle* requires a *de novo* trial in Federal Court for First Amendment claims even though administrative due process was provided by the governmental agency prior to employment termination.

4. Whether the Court below erred in not granting the College President absolute immunity as a functional prosecutor in view of adequate procedural safeguards.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court where judgment is sought to be reviewed are as follows: Plaintiffs-Appellants, Cross Appellees: The Professional Association of College Educators, TSTA/NEA, George Marchelos and Isela Castanon; Defendants-Appellees, Cross-Appellants: the El Paso County Community College District, Robert E. Shepack, Thomas Prendergast, Ted Karam, Arturo Lightbourn, Jeanene K. Smith, Eleanor Goodman, E. A. Aguilar, and Ramon Grado, Jr. Plaintiffs James Semones, Leonard Bailes and Mary Ellen Vargas did not perfect appeals.

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To The Honorable, The Chief Justice of the United States and the Associate Justices of the United States Supreme Court.

Petitioners, El Paso County Community College District and Robert E. Shepack, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Professional Association of College Educators, TSTA/NEA, et al. v. El Paso County Community College District, et al.*, 730 F.2d 258 (5th Cir. 1984), entered April 20, 1984.

OPINIONS BELOW

The judgment and opinion of the aforesaid Court of Appeals, reported at 730 F.2d 258 (5th Cir. 1984), is set forth in Appendices A and B, *infra*. The judgment of the District Court for the Western District of Texas is set forth in Appendix C, *infra*. The jury verdict form is set forth in Appendix D, *infra*.

JURISDICTION

The judgment sought to be reviewed was entered on April 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XIV, § 1 provides in pertinent part:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The Professional Association of College Educators (PACE), George Marchelos, James Semones, Leonard Bailes, Isela Castanon, and Mary Ellen Vargas, invoking 42 U.S.C. § 1983, brought suit against the El Paso County Community College District (the College), its President, Robert E. Shepack, and the members of the Board of Trustees. The individual plaintiffs were employees of the College who alleged that the defendants had engaged in a variety of impermissible actions in retaliation for plaintiffs' exercise of First Amendment rights.

Marchelos, an administrator, had been discharged after a hearing before the Board. The remaining plaintiffs were faculty members who had not been discharged, but asserted claims of wrongful treatment. Prior to trial, the district court dismissed the claims asserted by PACE, and upon trial, the jury found against plaintiffs Semones, Bailes, and Vargas. Appendix D-3 - D-5, D-8 - D-9.

The jury found that substantial or motivating factors for the discharge of Marchelos and the retaliation against Castanon were their respective associational activities.

Appendix D-1 - D-2, D-5 - D-8. Of all the defendants, only President Shepack was found to have been impermissibly motivated. In other matters not directly related to this petition, the district court refused to enter judgment for plaintiff Castanon, granted only a portion of the attorneys' fees claimed by the prevailing plaintiffs, and granted injunctive relief against all of the defendants. Appendix C-1 - C-4.

Plaintiff Marchelos, in accordance with the jury verdict, was awarded $7,500.00 for the "emotional distress, injury to his reputation and lost earnings which he sustained as a result of his discharge." Appendix C-1, D-2. The court denied, by order entered after the judgment, reinstatement of Marchelos in his former job as Dean of Curriculum and Instruction.

The Fifth Circuit affirmed the award of damages to Marchelos; reversed the denial of damages to Castanon and the dismissal of the PACE action; vacated the award of attorneys' fees; and partially vacated the injunction which had enjoined all defendants. Appendix B-33. In regard to Marchelos' reinstatement, the appellate court held that such an equitable remedy "is not automatic and absolute," and remanded this issue to the lower court for determination. Appendix B-18.

The Fifth Circuit wrote that this preferred remedy may not always be appropriate:

> The defendant also may avoid having the equitable remedy of reinstatement imposed upon it by proving by a preponderance of the evidence that the plaintiff has engaged in misconduct so serious that even when balanced against the school's violation of first amendment rights, equity would not be served by requiring

> reinstatement. Stated differently, an employee's misconduct surrounding his dismissal, or subsequent to his dismissal, may be so unjustified or opprobrious that he is in no position to demand equity. In evaluating the defendant's position, the court may focus on the degree to which his conduct may interfere with effective job performance or working relationships within the institution, as well as on the nature of the misconduct itself. Appendix B-19 - B-20.

The Petitioners herein do not seek review of the judgment as it relates to reinstatement, injunctive relief, attorneys' fees, the remand of PACE's claims or the damages awarded Castanon. Petitioners seek review of the portions of the judgment which found Shepack liable to Marchelos. The following facts are material to the consideration of the questions presented, and relate to the administrative hearing which resulted in the dismissal of Marchelos.

Dean Marchelos was a participant in two separate and distinct procedures at the College during the Spring and Summer of 1979. One procedure involved claims which allegedly arose out of his exercise of First Amendment rights. The other was concerned with four specific charges, the hearing of which resulted in his discharge as a College employee.

The procedure which the College offered Marchelos regarding his First Amendment claims was rejected by him. These claims and the procedure by which they could have been resolved were the subject of correspondence between Marchelos and the College. On June 1, 1979 Marchelos, through his attorney, outlined several claims of "the chilling effect on the exercise of his First Amendment rights to free speech by the College Administration."

Shepack forwarded copies of the letter to the Board of Trustees. The Board later discussed the letter among themselves at a regular meeting.

Shepack replied to the June 1 letter by suggesting that Dean Marchelos avail himself of the grievance procedure adopted for complaints concerning wages, hours and working conditions. Further correspondence was exchanged, with the upshot being that Marchelos was willing to avail himself of grievance procedures before the College President or his designee, but only on several conditions, the primary one of which was the condition that he, Marchelos, would not forego his right to ultimately appear before the Board. On June 12, 1979, Shepack forwarded a copy of the complaint procedure and the forms for its use. The President also explained that he could not speak for the Board of Trustees regarding the appearance before the Board.

On June 20, 1979, Dr. Shepack learned that Dean Marchelos had placed three anonymous telephone calls to the Shepack residence early the previous morning. The Shepack household had been subjected to numerous late night calls for some ten weeks. The calls generally occurred after 11:00 p.m., and ended with no response when answered by Shepack or his family. Tracing equipment was installed to ascertain the identity of the caller. At 1:27 a.m. on June 19, 1979, the next annoyance call arrived: the first since the monitoring equipment was installed. Forty-three minutes later at 2:10 a.m. a second anonymous call arrived, and at 3:44 a.m. a third.

All of the calls later were established to have been made from the telephone number assigned Marchelos. After his arrest the telephone calls ceased.

The anonymous telephone harassment was one of the four charges later brought against Marchelos. The other charges, stated in brief, were that Marchelos had failed to complete and file personnel leave forms for the purpose of obtaining additional paid leave; that Marchelos recommended on political grounds that an employee not be promoted; and that Marchelos violated express instructions not to authorize certain course overloads. Inquiries had been made beginning in May of 1979 regarding the leave forms, but neither this investigation nor the instructions concerning the course overload were enumerated in his attorney's letter of June 1, 1979, wherein various allegations of harassment and First Amendment violations were made.

On June 21, 1979, Marchelos, through his attorney, rejected the grievance procedures and renewed his request for a Board hearing. On June 27, 1979, Thomas Prendergast, President of the Board of Trustees, wrote to Marchelos that the grievance procedure was the proper forum for the First Amendment claims. His various grievances about working conditions and his complaint about perceived limitations on free speech could have been resolved through this mechanism. But Marchelos did not choose to engage this procedure.

Instead he sought to turn the termination hearing into a forum for the grievances, claiming that the specific charges of misconduct were brought as retaliation for his exercise of protected activity. To do this he sought to introduce, among other things, the complaints he initiated concerning wages, hours and working conditions; a variety of testimony regarding alleged harassment by fellow administrators; and his organizational activities on the behalf of PACE. Everything contained in the June 1, 1979

letter, including the letter itself, was sought to be placed in evidence. The letter was read by the Board President at the hearing, and made a part of the record. The Board, however, did not admit the letter or any testimony of the grievances into evidence on the ground that those matters were irrelevant to the charges being heard.

The College's "Disciplinary Policy for Administrators" provides due process procedures for "discipline of an administrator within the term of his or her contract. . . ." The policy, in Section 3.33.03, gives the President discretion whether "charges of dismissal" will be brought. The President must reduce the ground for dismissal to writing and forward this notice to the administrator. If a hearing is requested, Section 3.36.05 specifies that it shall be before the Board of Trustees. The policy grants the President the function of prosecutor while the judicial function is granted to the Board. Shepack had no authority to dismiss Marchelos, that power being reserved, under the rule of the College and the law of the State, to the Board of Trustees.

The hearing took place July 21, 1979 with the Board receiving evidence on the four charges for some eleven hours. Mr. Prendergast, consistent with his June 27 letter offering a separate hearing for Mr. Marchelos' June 1 First Amendment claims, refused to allow testimony concerning the June 1 charges.

Marchelos was allowed to be represented by counsel; to cross-examine witnesses against him; to call six witnesses in his defense, including himself; and to present documentary evidence in his defense. The College did not call Marchelos to testify; rather, his own attorney called him to testify. During cross-examination, Marchelos in-

voked his Fifth Amendment privilege against self-incrimination. No motion for continuance or similar request ever was filed with the Board in order to gain time within which to conclude the criminal matter, and thereby allow full testimony.

No challenge to the impartiality of the members of the Board was made prior to the hearing. Based on the hearing evidence, the Board members returned their findings sustaining the telephone harassment charge, the leave charge and the summer class overload charge. Their unanimous decision was to discharge Marchelos for the stated causes.

The uncontroverted testimony of the Board members at trial was that Shepack never communicated with them about the charges prior to the July 21 hearing, that they had no knowledge of Marchelos' associational activities, and that they based their ruling only on the evidence presented at the administrative hearing. The jury, which was thoroughly instructed concerning the theory of conspiracy, found that none of the hearing panel was impermissibly motivated in discharging Marchelos.

The trial court found that Marchelos "was not afforded a meaningful opportunity to be heard in his own defense" at the Board hearing. Appendix C-3. This finding was based on Marchelos' preclusion "from presenting evidence that his potential termination was in retaliation for the exercise of his constitutionally protected First Amendment rights." *Id.* This point was appealed to the Fifth Circuit where Petitioners argued that the administrative hearing comported with substantive and procedural due process, and the evidence adduced at the hearing established substantial and sufficient grounds for dismissal. The Fifth Circuit rejected Petitioners' argument:

> Even if this is factually correct, despite the district court's contrary conclusion, it is beside the point. When presented with a claim that a faculty member was discharged in retaliation for exercising first amendment rights, a federal court does not sit simply to review administrative findings or to measure the procedural regularity of the process. Appendix B-10.

REASONS FOR GRANTING THE PETITION

I.

The hearing before the College Board of Trustees, and the substantial and sufficient grounds for dismissal therein established, should not be treated as being, in the words of the Fifth Circuit, "beside the point." Appendix B-10. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) does not validate the judicial disregard of the grounds for dismissal established in a due process hearing.

Mt. Healthy, supra at 287, devised a causation test "which . . . protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." The lower court had held that if the exercise of constitutionally protected rights played a substantial part in an adverse employment decision, the decision could not stand even though independent, permissible reasons for the decision existed. The Supreme Court rejected this rule, and crafted the following test:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" in the Board's decision not to

> rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.
>
> *Id.*

Mt. Healthy did not involve a fact situation where the public employee received a due process hearing prior to the adverse employment decision. As is common to many school district cases, the teacher was not rehired for the coming school year. After the expiration of the original contractual term, no new contract was offered the employee, and no hearing was held. The trial procedure was the only method to measure the respective interests of the public employer and employee.

The Supreme Court has stated that *Mt. Healthy,* together with *Perry v. Sindermann,* 408 U.S. 593 (1972) and *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979) are the progeny of *Pickering v. Board of Education,* 391 U.S. 563 (1968). *Connick v. Myers,* ____U.S.____, 103 S.Ct. 1684, 1688 (1983). The *Pickering* line of cases, wrote Mr. Justice White, are reflections of "both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every decision became a constitutional matter." *Id.* The existence of these competing interests requires the striking of "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra* at 568.

The interest of the public employee in exercising freedom of expression, *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), is to be weighed against the government's "legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.' " *Connick, supra* at 1692 quoting *Ex Parte Curtis,* 106 U.S. 371, 373 (1882). Governmental units, like any employer, "must have wide discretion and control over the management of its personnel and internal affairs." *Arnett v. Kennedy,* 416 U.S. 134, 168 (1974) (Powell, J., concurring).

Professor Schuck has addressed the recurring issue in the balancing process:

> Any just legal system aspires to remedy every significant wrong; those injured by officials violating established legal standards should be made whole. . . . But the scale has another balance, for other social interests and values are at stake than those of holding officials accountable to law, of remedying and compensating injury, and of deterring governmental wrongdoing, fundamental as those purposes are.
>
> The concern must also be with the process of governing, a process in which fallible human beings make countless complex judgments about ill-defined conflicting, and important social interests committed by law to their protection.
>
> Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials,* THE SUPREME COURT REVIEW, 281, 282 (1980).

In balancing the interests of the government and the individual, *Mt. Healthy* cautions against placing "an employee in a better position as a result of the exercise of

constitutionally protected conduct than he would have occupied had he done nothing." *Mt. Healthy, supra* at 285. Protected activity cannot be used as a screen for impermissible or illegal activity. Writing for a unanimous Court, Mr. Justice Rehnquist stated that, "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Id.* at 285-286.

There is no doubt that Marchelos' conduct, especially his campaign of late night telephone harassment, formed an independent basis for dismissal. His behavior was "aberrant" at best, and "opprobrious" at worst, Appendix B-21, B-19, leading the Fifth Circuit to recognize that in certain cases, "the probable adverse consequences of reinstatement can weigh so heavily that they counsel the court against imposing this preferred remedy." *Id.* at B-21. While reinstatement as a remedy was denied, the Court of Appeals still felt itself bound to make a rote application of *Mt. Healthy* to the College's employment decision.

Petitioners do not seek review of the reinstatement determination, but make mention of it to contrast the Fifth Circuit's approval of a causation test with their apparent distaste for Marchelos' activities. The test upon which the court felt obligated to place its imprimatur has rendered up a result which outrages equity, yet the court implies that nothing can be done.

Mt. Healthy and its antecedents do not place these strictures on the judicial system, and guidance from the Supreme Court is needed to remove the restraints imposed on the balancing process. As stated above, the trial court in *Mt. Healthy* was not presented with a record of a due

process termination hearing, nor were the courts in *Pickering v. Board of Education, supra; Perry v. Sindermann, supra; Givhan v. Western Line Consolidated School District, supra;* and *Connick v. Myers, supra.* The record of a hearing with due process safeguards cannot be ignored in a balancing test. Petitioners stress that they do not base their argument solely on procedural grounds, but assert, as they always have, that substantive due process also must be satisfied. If the "undesirable consequences" to the process of governing, mentioned in *Mt. Healthy, supra* at 287, are to be avoided, the due process hearings of governmental subdivisions must be given force and effect.

The College created a system of procedural due process to protect against the deprivation of an individual's "liberty" or "property" interest within the meaning of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York,* 268 U.S. 652 (1925); *Stromberg v. California,* 283 U.S. 359 (1931). The opportunity to be heard "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo,* 380 U.S. 545 (1965), was not denied Marchelos. Marchelos rejected the grievance procedure through which his free speech claims could have been resolved. At the Board hearing, after being called by his attorney to testify, he invoked the Fifth Amendment to actually prevent his own testimony about the telephone calls. His explanation at trial was that he was driven to call the Shepack residence by Shepack's alleged high pressure tactics. To the jury, Marchelos admitted to having made three telephone calls, but offered an excuse. However, he admitted to nothing at the Board hearing. How can it be said that he was precluded by the Board from presenting this or any other defense when he refused

exercise of discretion by executive officials, and to protect public servants from the vengeance of those targeted by an administrative proceeding. *Id.* at 515. Such a rule was fair to the individual, said Mr. Justice White, because "[t]he defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding", *Id.*, and that the "remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal . . ." *Id.* at 516.

Mr. Justice Rehnquist, joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice Stevens, concurred in part and dissented in part, urging a broader application of immunity. The wider use of the immunity defense would both insure uninhibited decisionmaking by officials and reduce the potential for disruption of government.

The majority believed this problem could be met by judges exercising summary judgment powers to weed out insubstantial claims and by the granting of absolute immunity where it could be demonstrated that such was essential for the conduct of public business. However, Mr. Justice Rehnquist felt these arguments showed more "optimism than prescience." *Id.* 527. His pessimism has been borne out by the Fifth Circuit's absolute refusal to consider the *Economou* arguments in this case. Appendix B-16.

Since the Supreme Court's rulings in *Perry v. Sindermann, supra; Board of Regents v. Roth,* 408 U.S. 564 (1972); and *Wood v. Strickland,* 420 U.S. 308 (1975), schools and colleges have developed termination procedures which must satisfy due process safeguards. The validity of charges must be tested at an impartial hearing. As with the judicial system, someone must perform the

role of prosecutor in order to initiate and try the charges. At the College that person was Robert Shepack.

The answer to this issue turns on the "functional comparability" or an administrative prosecutor to a judicial prosecutor. *Butz v. Economou, supra* at 512. If functional comparability can be shown, public policy demands absolute immunity. *Id.* at 506. The public policy evaluation involves three factors:

> 1. The functional comparability of an official's judgments to those of a prosecutor;
>
> 2. The nature of the controversy in which the official is forced to become a participant must be sufficiently intense so that there is a realistic prospect of continuing harassment of intimidation by disappointed litigants; and,
>
> 3. The system in which the official operates must contain safeguards adequate to reduce the need for private damage actions as a means of controlling unconstitutional conduct.
>
> *Id.* at 512.

In the case at bar, all three elements are present. Shepack had discretionary authority whether to bring the charges of dismissal against Marchelos and then prosecuted them before a separate and independent body through his representative, as with a judicial prosecutor.

Finally, the system employed by the College was replete with procedural safeguards. Attorneys were present, witnesses were questioned and cross-examined, documentary evidence was presented, arguments were made, and a verbatim record made and transcribed. Shepack should be immune from damages.

immunity may be chosen as a solution to the problem of intrusion upon valid governmental interests. Much of the argument presented in this Petition relates to the judicial use of prior administrative hearing records in balancing the interests of the individual and government. The procedural devices to protect substantive rights have been examined, and the argument made that a de novo hearing is not required. These devices also have concerned courts in examining claims of absolute immunity.

Prior to striking the balance in favor of governmental interests, the Court in *Butz v. Economou, supra* at 513, 515-516, examined the procedural safeguards against intrusion upon individual rights. Absolute immunity was granted only after the Court was satisfied that many of the same safeguards available in the judicial process were present in the administrative procedure.

The Seventh Circuit shared this concern that the administrative procedures protect individual rights. *Saxner v. Benson,* 727 F.2d 669 (7th Cir. 1984). A divided court concluded that the procedures of a prison discipline committee, composed of senior prison officials, did not meet with the standards set forth in *Economou.* Immunity was conditioned upon meeting the procedural requirements normally attendant to a judicial hearing: notice, representation by a lawyer, a verbatim transcript of the proceedings, subpoena power, the right to present evidence, cross examination of witnesses under oath, rebuttal evidence and prehearing discovery. *Saxner v. Benson, supra* at 674-675 (Cudahy, J., concurring). All of these protections were afforded Marchelos, with the exception of the subpoena power.

The Tenth Circuit granted absolute immunity to the Kansas State Board of Healing Arts because it was found

that, as a matter of law, the Board was acting in a quasi-judicial capacity. *Vakas v. Rodriquez,* 728 F.2d 1293 (10th Cir. 1984) citing *Stump v. Sparkman,* 435 U.S. 349 (1978). The plaintiff originally had claimed that the board had committed procedural errors in his disciplinary hearing, and could not claim immunity. The Tenth Circuit held that so long as the board's investigation and commencement of proceedings were within its jurisdiction, the board was immune.

The procedures adopted by the El Paso Community College satisfy the due process requirements of *Economou,* and the actions of Shepack meet its functional comparability test. The fact that he is a college president, administering a state governmental subdivision, should not work to remove him from the reach of absolute immunity. The rationale of immunity, expressed by Mr. Justice Rehnquist, also should be considered: public officials must carry out the duties imposed upon them by law without significant impariment. *Economou, supra* at 526-530.

The impairment on the College is not difficult to ascertain under the Fifth Circuit's present holding. Suppose Shepack receives word tomorrow morning from the police that the identity of an anonymous telephone caller at last has been established. Shepack is informed that it is a high level college official, a man he sees on a daily basis. Given the legal background of the case at bar, what would Shepack do this time? Would he file a complaint and endure an administrative hearing, followed by a federal trial, appeal, and remand? Or would he decline to act? Regardless of his hypothetical decision, he would, like the Secretary of Agriculture, "obviously

think not only twice but thrice about whether to prosecute." *Economou, supra* at 527.

III.

In decisions prior to the instant case, the Fifth Circuit took into account the need to balance the interest of the individual against the need to preserve the process of governing.

In upholding the award of damages to Marchelos the Fifth Circuit rejected its prior holdings in *Ferguson v. Thomas,* 430 F.2d 852 (5th Cir. 1970); *Robison v. Wichita Falls & North Texas Community Action Corporation,* 507 F.2d 245 (5th Cir. 1975); and *Stapp v. Avoyelles Parish School Board,* 545 F.2d 527 (5th Cir. 1977).

In *Ferguson, supra* at 856, the Fifth Circuit set out the "rudiments of due process fair play" in academic hearings:

> Within the matrix of the particular circumstances present when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that:
>
> (a) He be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist.
>
> (b) He be advised of the names and the nature of the testimony of witnesses against him.
>
> (c) At a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense.
>
> (d) That hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.

The Court of Appeals, in announcing this due process administrative standard, cautioned against trial procedures which would uniformly allow the full development of the merits as a matter of course. Limits were placed on the review of academic employment decisions for the purpose of avoiding both "an intrustion into the internal affairs of state educational institutions and an unwise burden on judicial administration of the courts." *Id.* at 858.

The *Ferguson* Court held that the trial court should limit its initial examination to whether or not federal rights have been violated by the administrative procedures implemented. If the procedures violate no right the court then should examine the record to ascertain "whether there was substantial evidence before the agency to support the action taken, with due care taken to judge the constitutionality of the school's action on the basis of the facts that were before the agency, and on the logic applied by it." *Ferguson, supra* at 858. A finding by the trial court of correct procedures and substantial evidence "ordinarily ends the matter." *Id.* The Court concluded that:

> If the instructor challenges his termination on grounds that his constitutional rights have been infringed, a decision of that claim may and should be avoided if valid non-discriminatory grounds are shown to have been the basis of the institution's action.
>
> *Id.*

In *Robison v. Wichita Falls & North Texas Community Action Corporation, supra,* the Fifth Circuit affirmed the trial court's judgment rendered in favor of defendants. Of importance to the instant cause was the refusal of the lower court to hear evidence of the former employee's

claim that his discharge was due to his exercise of First Amendment rights.

The defendant was a nonprofit corporation funded by the Office of Economic Opportunity, and an appeal procedure was provided in the by-laws, whereby any employment termination could be appealed to the grievance committee and then, if necessary, to the executive committee. Upon being terminated for submitting fraudulent travel vouchers, plaintiff appealed to the appropriate agency committees which also found that he had defrauded the Community Action Corporation. Suit later was filed in federal court, alleging that plaintiff's First and Fourteenth Amendment rights were violated because (1) he was not given a "trial-type hearing before an impartial panel," and (2) his termination was in retaliation for the exercise of his right of free speech. *Id.* at 248. The appellate court held that the hearing conformed to due process standards and upheld the trial court's refusal to hear evidence on the First Amendment issue:

> When constitutionally neutral reasons are themselves sufficient to uphold the deciding authority's judgment and there is no allegation of discrimination in the sense of holding a discharged employee to a tougher standard than that used to measure the performance of his peers, we see no benefit to be gained from hearing evidence on the constitutional claim.
>
> *Id.* at 254.

The court then set out the correct procedure to be followed by trial courts:

> Section 1983 plaintiffs do not have *carte blanche* rights to present evidence of a First Amendment violation in every employment discharge case. The

> first step in such a case must be an inquiry into the sufficiency of the employer's stated reasons for terminating the employee. Three different situations may exist. First, no reasons may be stated or the stated reasons for terminating the employee may be clearly insubstantial. In that case, the absence or insubstantiality of the stated reasons adds weight to the allegation that the discharge resulted from constitutionally impermissible reasons and the court must reach the constitutional claims. Second, where the facts do tend to support the employer's stated reasons, the plaintiffs would not necessarily be precluded from demonstrating that constitutionally impermissible purposes were also a necessary factor in the termination decision. In such a case, "[w]e recognize that a justifiable ground of discharge is not a defense when that ground is a mere pretext and not the moving cause of the discharge." *Cook County College Teachers Union, Local 1600 v. Byrd*, 7 Cir. 1972, 456 F.2d 882, 888. Where the stated reasons are substantial but not sufficient by themselves to justify the discharge, the constitutionally impermissible reason would be a necessary factor on which the court must hear evidence. The third possible situation is where the organization's stated reasons constitute a sufficient as well as a substantial basis for the decision. Where there is no allegation of unequal treatment or selective enforcement and where the stated reason is itself sufficient to justify the discharge, we see nothing to be gained from hearing evidence on the First Amendment claim.
>
> *Id.* at 255.

Prior to analyzing the "three different situations" common to employment cases, the *Robison* court stated that the plaintiff was of the apparent belief "that even an undisputed embezzler would be entitled to damages and reinstatement if any link whatsoever could be established

between his exercise of First Amendment rights and the discharge." *Id.* at 254.

The Fifth Circuit in *Stapp v. Avoyelles Parish School Board, supra* at 534, adopted much of the *Robison* court's reasoning as well as its definitional terms of "substantial" and "sufficient" reasons for discharge. The portion of *Stapp* which the Fifth Circuit has now rejected begins with the statement that "[o]rdinarily the District Court is not expected to conduct a de novo hearing." *Id.* It goes on to say that the initial inquiry of the trial court is "to *examine the record* of the school board's hearing to ascertain whether the *procedures* followed violated federal rights." *Id.* (emphasis original). If procedural due process was satisfied the evidence in the record must next be reviewed to determine if it is substantial.

First Amendment claims were present in *Stapp* and further analysis of the discharge hearing was necessary:

> Because a First Amendment claim is involved, the substantiality of evidence supporting School Board's discharge should be further classified to determine whether the District Court must decide the First Amendment claim and hold an evidentiary hearing on whether Principal's exercise of his speech rights was a significant basis for his discharge. In reviewing School Board's record, the reasons given for Principal's discharge may prove to be clearly insubstantial, substantial and sufficient, or substantial but insufficient. If the reasons are substantial and sufficient, the District Court need not consider or receive evidence on the First Amendment claim. If clearly insubstantial, the District Court must consider and receive evidence on the First Amendment allegation for substantial but insufficient reasons.
>
> *Id.* (citations omitted).

The Fifth Circuit in *Ferguson, Robison,* and *Stapp* did not ignore First Amendment rights. The court initially focused on procedure only as a prelude to further examination. The reasons for discharge could not be illusory, as the present opinion implies, Appendix B-12, but were required to have substance.

Countless administrative hearings are conducted throughout the United States every year. Some adhere to due process guidelines while others fail to offer any specie of protection. Some may employ elaborate procedures which allow the deprivation of liberty or property on grounds that are neither sufficient nor substantial. But other hearings actually do protect individual rights through procedural fair-play, and require substantial reasons for adverse employment decisions.

This latter category of hearing must be given some meaning in First Amendment employment termination cases. Governmental subdivisions are required to conduct such hearings, yet the results are virtually meaningless if the subdivision prevails. Under the Fifth Circuit's present view of *Mt. Healthy,* extreme employee misconduct, established at a hearing with all the judicial safeguards, must always be proven anew.

The procedures which were accorded Marchelos protected against the invasion of constitutional rights. The reasons for dismissal were sufficient and substantial. The results of his due process hearing must now be given weight. This Court must strike the correct balance.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon Julia Penny Clark, Suite 1300, 1000 Connecticut Avenue N.W., Washington, D.C. 20036 and Robert E. Hall, San Felipe Square, 5850 San Felipe, Houston, Texas 77057, by United States Mail, first class, postage prepaid, on this 18th day of July, 1984.

EDWARD W. DUNBAR

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-1102

D. C. Docket No. EP-80-CA-225

PROFESSIONAL ASSOCIATION OF COLLEGE EDUCATORS, TSTA/NEA, et al.,
Plaintiffs-Appellants Cross-Appellees,

v.

EL PASO COUNTY COMMUNITY COLLEGE DISTRICT, et al.,
Defendants-Appellees,

El Paso County Community College District &
Robert Shepack, Defendants-Appelles Cross Appellants.

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, GARWOOD and JOLLY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, reversed in part, vacated in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that Defendants-Appellees Cross-Appellants pay to Plaintiffs-Appellants Cross-Appellees the costs on appeal, to be taxed by the Clerk of this Court

April 20, 1984

RUBIN, Circuit Judge, dissenting from Part III B.

ISSUED AS MANDATE:

OP-JDT-9

APPENDIX B

PROFESSIONAL ASSOCIATION OF COLLEGE EDUCATORS, TSTA/NEA, et. al.,
Plaintiffs-Appellants Cross-Appellees,

v.

EL PASO COUNTY COMMUNITY COLLEGE DISTRICT, et.al.,
Defendants-Appellees,

El Paso County Community College District &
Robert Shepack, Defendants-Appellees Cross-Appellants.

NO. 82-1102.

United States Court of Appeals,
Fifth Circuit.

April 20, 1984.

Association of college faculty members and five individuals brought action alleging that their First Amendment rights were infringed by action of state college and its president. The United States District Court for the Western District of Texas, Lucius Desha Bunton, III, J., entered judgment granting plaintiffs' partial relief, and appeals were taken. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) complaint stated cause of action that association's First Amendment rights were violated; (2) fact that college dean did not have continued expectation in employment did not provide justification for denying him reinstatement following finding that his First Amendment rights were violated; (3)

injunction was sufficiently specific and was not overly broad in sense of unduly prohibiting conduct similar to violations established; but (4) injunction was improper as it applied to college and to persons other than college president, and as it protected persons other than faculty member.

Affirmed in part; reversed in part; vacated in part and remanded.

Alvin B. Rubin, Circuit Judge, dissented in part and filed opinion.

Appeals from the United States District Court for the Western District of Texas.

Before RUBIN, Garwood and Jolly, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

An association of college faculty members and five individual educators seek vindication of their first amendment rights, which they contend were infringed by the action of a state college in attempting to destroy the association, in discharging one faculty member, and in discriminating against others. Having won partial relief as a result of the verdict of a jury that decided some issues in their favor, the educators seek additional relief and additional attorneys' fees. The association seeks a hearing on its claims, which the district court dismissed before trial. After full consideration of these and other issues, we reverse the order dismissing the association's claim; affirm the award of damages to George Marchelos; reinstate the jury verdict in favor of another educator, Isela Castanon; order the district court to modify the injunction

it has issued; and vacate the award of attorneys' fees, remanding this issue for redetermination. In Part IIIB of his opinion, we deny reinstatement to Marchelos, Judge Rubin dissenting from that part only.

I.

The Professional Association of College Educators (PACE) is an unincorporated association of faculty members of El Paso Community College which is operated by an agency of the State of Texas called the El Paso County Community College District ("The College"). Invoking 42 U.S.C. § 1983, PACE and five individual faculty members sued The College, its president, and the members of its Board of Trustees, alleging that these defendants had tried to destroy PACE and a sister organization, the El Paso Community College District Association of Administrators, by threatening and intimidating their members and officers and by denying them privileges enjoyed by other faculty members. The plaintiffs attached to their complaint a "bill of particulars" that specified several instances of allegedly wrongful conduct. PACE and the individual plaintiffs sought damages and injunctive relief against future retaliatory and discriminatory acts. George Marchelos, who had been Dean of Curriculum and Instruction before being discharged, sought damages and reinstatement. Isela Castanon, an instructor in the child development program, sought damages for retaliatory actions and for reassignment to an undesirable schedule.

The plaintiffs focused their claims against Robert E. Shepack, the president of the College. The presented evidence that he was hostile to unions generally and wanted to destroy both PACE and the Association of Adminis-

trators, which he considered union-type organizations. Marchelos was president of the Association of Administrators and the moving force behind its formation. Castanon was active in PACE and in a faculty investigation of Shepack's hiring practices. She also assisted individual faculty members in filing and processing grievances.

The jury returned a verdict on special interrogatories for two of the five plaintiffs, awarding George Marchelos $7,500 for his discharge in violation of the first amendment, and Isela Castanon $2,500 for actions taken against her by the College in retaliation for filing grievances. It found, however, that Castanon would have been reassigned even if she had not undertaken protected activities. (The jury's verdict unfavorable to the other three individual plaintiffs has not been appealed.)[1]

The district court entered judgment awarding Marchelos the compensatory damages assessed by the jury against Shepack but denying him reinstatement. The court denied any award to Castanon on the basis that the jury's finding that she would have been reassigned even absent her protected activities precluded the recovery of damages for retaliation. In response to the plaintiffs' claim of attorneys' fees in the amount of $83,000 and $15,000 in costs, the court awarded only fees of $5,000.

II.

Because the dismissal of PACE's claim occurred before trial, it was proper only if it appeared "beyond doubt" that PACE could prove "no set of facts in support of

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1. In its answers to the special interrogatories, the jury exonerated the individual members of the Board of Trustees, finding that only Shepack's antiunion animus caused the injury.

[its] claim which would entitle [it] to relief." *Conley v. Gibson,* 355 U.S. 41, 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957). As Professor Charles Alan Wright aptly sums up the rule, it "precludes final dismissal for insufficiency of the complaint except in the extraordinary case where the pleader makes allegations that show on the face of the complaint some insuperable bar to relief." C. Wright, Federal Courts 442 (4th ed. 1983).

The complaint alleged that The College had engaged in a deliberate program to retaliate against PACE's members and officers for the purpose of "destroy[ing] the effectiveness and proper functioning of PACE as an agent for its members." It alleged that the defendants sought to achieve this goal by "intimidat[ing] and harrass[ing] present members of PACE or the Association of Administrators, [in order to] discourage them from continuing their membership in PACE and to frighten faculty employees not affiliated with PACE or the Association of Administrators to prevent them from joining or supporting the efforts of those organizations." It alleged also that the defendants had acted against each of the individual plaintiffs as part of this campaign to destroy PACE. These actions, according to the complaint, violated the plaintiffs' rights under the first and fourteenth amendments to associate for the advancement of their common interests in dealings with The College. The complaint also alleged that The College discriminated against PACE by denying it access to the campus mail service while granting that service to similar organizations in order to stifle PACE's exercise of first amendment rights. The relief sought for PACE included an injunction protecting the organization and its present and future members as well as an award of damages to the organization.

[1, 2] The first amendment protects the rights of all persons to associate together in groups to further their lawful interests.[2] This right of association encompasses the right of public employees to join unions and the right of their unions to engage in advocacy and to petition government in their behalf. Thus, the first amendment is violated by state action whose purpose is either to intimidate public employees from joining a union or from taking an active part in its affairs or to retaliate against those who do.[3] Such "protected First Amendment rights flow to unions as well as to their members and organizers." *Allee v. Medrano,* 416 U.S. 802, 819 n. 13, 94 S.Ct. 2191, 2202 n. 13, 40 L.Ed.2d 566, 582 n. 13 (1974).

The issue is not, as the defendants appear to argue, whether a public employer is required to deal with a union or other employee association but whether, assuming the correctness of the allegations of the complaint, the state may set out in injure or destroy an association of public employees for the purpose of preventing the exercise of their first amendment rights. Although some of the acts alleged caused only insubstantial injury, the PACE claims are not trifling when viewed in their totality.[4] PACE need

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2. *E.g., Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Healy v. James,* 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 84 S.Ct. 1113, 1116, 12 L.Ed.2d 89, 93 (1964); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

3. *Smith v. Arkansas State Highway Employees Local 1315,* 441 U.S. 463, 464-66, 99 S.Ct. 1826, 1827-28, 60 L.Ed.2d 360, 362-63 (1979); *Alabama State Federation of Teachers v. James,* 656 F.2d 193, 197 (5th Cir. 1981); *United Steelworkers of America v. Univ. of Alabama,* 599 F.2d 56, 61 (5th Cir. 1979); *Orr v. Thorpe,* 427 F.2d 1129, 1131 (5th Cir. 1970).

4. Compare *Raymon v. Alvord Indep. School Dist.,* 639 F.2d 257 (5th Cir. 1981), in which the only injury suffered was a patently insubstantial difference in a student's grade score.

not show that it and its members are entitled to all relief claimed but only that they are entitled to some relief if their claims are proved. If the organization is entitled to relief, the redress might encompass claims that, standing alone, would not support an action.

[3-5] The College also challenges PACE's contention that its constitutional rights were violated by the denial of campus mail services. There is, of course, no substantive first amendment right to use a state organization's facilities.[5] But even if The College has not made a public forum of campus mails, the first amendment forbids it to discriminatorily grant or deny parties other than the college access to the service as a means for advancing or discouraging particular points of view.[6] As we have noted, the complaint alleges that The College permitted organizations similar to PACE to use the campus mail service but denied PACE use of the service in order to stifle PACE's associative and expressive activities. The complaint on its face, therefore, states a basis on which relief could be granted if its allegations are proved.

[6-8] Similar principles apply to PACE's claim that The College retaliated against PACE members when deciding formal college grievances. The Constitution does not require a public employer either to establish a grievance procedure or to respond to grievances lodged by its employees or their union. *Smith v. Arkansas State Highway Employees,* 441 U.S. 463, 465, 99 S.Ct. 1826,

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5. *See Connecticut State Fed'n of Teachers v. Bd. of Educ. Members,* 538 F.2d 471 (2d Cir. 1976).

6. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* ____U.S. ____, ____, 103 S.Ct. 948, 955, 74 L.Ed.2d 794, 805 (1983); *Ysleta Fed'n of Teachers v. Ysleta Indep. School Dist.,* 720 F.2d 1429 at 1431-1434 (5th Cir. 1983).

1828, 60 L.Ed.2d 360, 363 (1979). Nevertheless, if a public employer voluntarily establishes a grievance procedure, then discriminates or retaliates against union members in administering that process, it violates the first amendment.[7] In *Smith* the Supreme Court denied relief because the plaintiff had made "no claim of retaliation or discrimination proscribed by the First Amendment," and the employer had not "tak[en] steps to . . . discourage union membership or association." 441 U.S. at 465-66, 99 S.Ct. at 1828, 60 L.Ed.2d at 363. Here that very claim is asserted: the complaint alleged that such improper motives were behind the defendants' withdrawal of campus mail privileges and refusal to process the grievances of PACE members according to the terms of The College's written procedure. Those allegations, if proved, could furnish grounds for relief to PACE as part of, or even independent of, its basic claim of a general campaign to harass and retaliate against its members for exercising their rights of association. PACE and its members were entitled to an opportunity to prove the truth of their allegations and, if they succeeded in proving a violation, the extent of their injury and the need for an injunction.

III.

Like other college administrators, Marchelos was employed on an annual contract lacking any provision for reemployment from one year to the next. There was evidence from which the jury might have found, as its verdict implies it did, that Marchelos had formed the Association

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7. *Alabama State Fed'n of Teachers v. James*, 656 F.2d 193, 197 (5th Cir. 1981); *Henrico Professional Firefighters Ass'n Local 1568 v. Bd. of Supervisors*, 649 F.2d 237, 241 (4th Cir. 1981).

of Administrators and had, as a result of this and other activities, incurred the enmity of President Shepack. The evidence also was sufficient to warrant the finding that, in reprisal for exercising first amendment rights, Shepack suspended Marchelos without pay and brought formal charges recommending to the Board of Trustees that he be discharged. The Trustees sustained three of Shepack's four charges and fired Marchelos before his contract of employment had ended. The three charges sustained by the Board were: recommending as Dean of Arts and Sciences that Professor Semones (another plaintiff) be given an extra teaching assignment for the summer of 1979 notwithstanding the Vice-President's announcement that there would be no overloads for the summer, failing to submit a proper form before taking leave in December 1978 and falsely stating how much leave he had taken, and placing "annoyance" telephone calls to Shepack's residence between 1:00 and 4:00 a.m. At the Board hearing on these charges, Marchelos' counsel attempted to prove that Marchelos was the victim of retaliation for his activities in the Administrative & Professional Forum and in the Association of Administrators, but the Trustees refused to hear all evidence except that directly relating to the formal charges.

The jury returned a verdict in favor of Marchelos on special intrrogatories, finding that "a substantial or motivating factor for the discharge of George Marchelos was his associational activity." It also found that "the same decision as to [his] dismissal would not have been reached in the absence of his associational activities," and that $7,500 would compensate him for "the emotional distress, injury to his reputation and lost earnings which he sustained as a result of his discharge."

The district court entered judgment on the jury's verdict for damages in the amount of $7,500 but denied Marchelos reinstatement. That remedy would be "inappropriate," the court reasoned, because Marchelos had only a one-year contract when he was discharged. Since ten months of that year had elapsed before Marchelos was suspended, the trial court considered that the award of damages sufficiently compensated him for the remainder of his contract term.

A.

The College argues that Marchelos' first amendment claim should not have been presented to the jury at all, because the Board of Trustees established substantial and sufficient grounds for his dismissal after an administrative hearing that comported with due process and produced a record supporting the Board's findings. Even if this is factually correct, despite the district court's contrary conclusion,[8] it is beside the point. When presented with a claim that a faculty member was discharged in retaliation for exercising first amendment rights, a federal court does not sit simply to review administrative findings or to measure the procedural regularity of the process.

In *Robison v. Wichita Falls & North Texas Community Action Corp.*, 507 F.2d 245, 254-56 (5th Cir. 1975), we held that a discharged public employee who had received due process in a hearing was not entitled to a full trial on his claim that the discharge was motivated by his exercise of first amendment rights. We instructed

8. The district court found that the Board hearing did not afford Marchelos a meaningful opportunity to be heard because Marchelos was prevented from presenting evidence that the charges were retaliatory.

that district courts must hear evidence on the first amendment claim only if the employer gave no reasons, or if the court concluded that the stated reasons were "clearly insubstantial," or "substantial but not sufficient by themselves to justify the discharge." 507 F.2d at 255.[9] The premise of *Robison* was that, if the employer could show its decision was justified, inquiry into the actual motive for the decision was unnecessary unless the plaintiff could prove unequal treatment or selective enforcement. We rejected the employee's contention that his discharge would be invalid if based even partially on protected activity.

[9] Two years after we decided *Robison,* however, the Supreme Court announced in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), that the issue is not whether the discharge can somehow be objectively justified, but whether it was in fact improperly motivated. "Even though [the faculty member] could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him

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9. We derived this analysis from *Furguson v. Thomas,* 430 F.2d 852, 859 (5th Cir. 1970), in which we stated that the findings of a school board considering the termination of an instructor are entitled to great weight in federal courts if the instructor was accorded due process and the board had before it substantial evidence to support its conclusion. We recognized, however, that an unconstitutional result could be reached despite procedural and substantive regularity and therefore carefully avoided holding that federal courts are bound by the determinations of college disciplinary boards. "Since § 1983 vests original and not appellate jurisdiction in the district courts, the findings of a college board of directors or similar school review agency are not to be accorded the stature of findings of a district court . . . or the findings of a federal agency subject to review under the Administrative Procedure Act." *Id.* at 859. *Furguson,* therefore, cannot support The College's argument that a district court errs by considering a claim asserted to be inconsistent with a finding of the Board of Trustees.

. . . , he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of the exercise of constitutionally protected First Amendment freedoms." *Id.* 429 U.S. at 283, 97 S.Ct. at 574, 50 L.Ed.2d at 481. If a nontenured faculty member is not rehired or is discharged, he must show "that his conduct was constitutionally protected, and that this conduct was a 'substantial [or] . . . motivating factor' in the Board's decision not to rehire him." If he does so, then to defeat his claim, the Board must show "by a preponderance of the evidence that it *would* have reached the same decision . . . even in the absence of the protected conduct." *Id.* 429 U.S. at 287, 97 S.Ct. at 576, 50 L.Ed.2d at 484 (emphasis added). In short, the question is not whether the employer justifiably could have made the same decision but whether it actually would have done so.[10]

Robison is patently inconsistent with the *Mt. Healthy* analysis, for an employer could hold a full hearing, satisfy the procedural requirements of due process, and nevertheless dismiss an employee for reasons that would not have led to dismissal in the absence of protected speech or association.[11] Since the Supreme Court decided

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10. *Ayers v. Western Line Consol. School Dist.*, 555 F.2d 1309, 1315 (5th Cir. 1977), *rev'd on other grounds*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979); *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337, 339-40 (5th Cir. 1982), *cert. denied*, ____ U.S.____, 103 S.Ct. 2119, 77 L.Ed.2d 1300 (1983); *Bowen v. Watkins*, 669 F.2d 979, 985, (5th Cir. 1982); *Love v. Sessions*, 568 F.2d 357, 360 (5th Cir. 1978).

11. *See Bueno v. City of Donna*, 714 F.2d 484, 496-97 (5th Cir. 1983) (Rubin, J., concurring specially) (first amendment violated by discharge motivated in part by protected activity notwithstanding existence of permissible reasons for discharge).

Mt. Healthy, we have properly and consistently followed its lead and have never returned to the *Robison* rationale.[12]

The defendants challenge the sufficiency of the evidence to support the verdict on the basis that the jury found that no member of the Board of Trustees was

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12. *See Stewart v. Bailey*, 561 F.2d 1195 (5th Cir. 1977), *granting reh'g of* 556 F.2d 281 (5th Cir. 1977); *Goss v. San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979), *modified on reh. on other grounds*, 595 F.2d 1119 (5th Cir. 1979); *Truly v. Madison Gen. Hosp.*, 673 F.2d 763 (5th Cir. 1982), *cert. denied*, ____U.S. ____, 103 S.Ct. 214, 74 L.Ed.2d 170 (1983).

In *Stapp v. Avoyelles Parish School Bd.*, 545 F.2d 527, 534 (5th Cir. 1977), we reiterated the *Robison* rule in dictum. The Stapp opinion was published six days after *Mt. Healthy* was decided. It does not cite *Mt. Healthy*, however, and nothing in the opinion suggests that the parties had called *Mt. Healthy* to the court's attention in the brief period between its announcement and the rendition of *Stapp*. Indeed, because the printing of our opinions requires at least ten to fourteen days, the decision in *Stapp* was doubtless signed and sent to the printer before *Mt. Healthy* was published. No subsequent petition for rehearing called *Mt. Healthy* to the panel's attention. Therefore, we regard *Mt. Healthy* as intervening contrary authority, *see Robinson v. Parsons*, 560 F.2d 720, 721 n. 2 (5th Cir. 1977), notwithstanding its publication before *Stapp*. *Cf. Hernandez v. City of Lafayette*, 643 F.2d 1188, 1192-93 & n. 9 (5th Cir. 1981), *cert. denied*, 455 U.S. 907, 102 S.Ct. 1251, 71 L.Ed.2d 444 (1982).

The College argues that we have applied *Robison* in two other decisions after *Mt. Healthy*: *Bowling v. Scott*, 587 F.2d 229 (5th Cir. 1979), *cert. denied*, 444 U.S. 835, 100 S.Ct. 69, 62 L.Ed.2d 45 (1979), and *Viverette v. Lurleen B. Wallace State Junior College*, 587 F.2d 191 (5th Cir. 1979). This simply reflects a misreading of our opinions. *Bowling* adjudicated a due process claim, not a first amendment claim. Obviously, *Mt. Healthy* did not undermine our prior decisions regarding claims unrelated to protected speech and association. In *Viverette*, we did adopt administrative findings on first amendment issues after determining that the findings were substantially supported by the administrative record. The parties in *Viverette*, however, had submitted their case to the district court for decision based on the administrative record and other stipulations. Because neither party sought de novo hearing, there was no reason to scrutinize the compatibility of the *Robison* analysis and *Mt. Healthy*.

motivated to discharge Marchelos for his associational activities. Shepack did not have authority to fire Marchelos, but only to recommend that he be fired; the Board of Trustees made the decision to fire him after a hearing. The jury also found, however, that Shepack was "so motivated" and that Marchelos would not have been dismissed "in the absence of his associational activities." Based on that verdict, the district court entered judgment for damages against Shepack alone.

[10] The causation issue in first amendment cases is purely factual: did retaliation for protected activity cause the termination in the sense that the termination would not have occurred in its absence? It is not necessary that the improper motive be the final link in the chain of causation: if an improper motive sets in motion the events that lead to termination that would not otherwise occur, "intermediate step[s] in the chain of causation" do not necessarily defeat the plaintiff's claim. *Bowen v. Watkins*, 669 F.2d 979, 986 (5th Cir. 1982).[13]

[11] Here, the Board of Trustees stood between Shepack and Marchelos' dismissal, but the jury could conclude, as apparently it did, that the Board would not have considered dismissing Marchelos if Shepack had not brought charges in reprisal for protected activity. Thus, the jury's verdict is consistent with the conclusion that, but for Shepack's response to protected activity, the Board would not have discharged Marchelos.[14]

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13. We do not consider whether a subsequent dramatic event might effectively defeat the claim of a discharged employee to reinstatement. Thus, we intimate no opinion concerning the situation that would be presented if an unconstitutionally discharged employee were later caught burglarizing his employer's office to gain incriminating evidence to support his claim.

14. Damages were awarded to Marchelos against Shepack only, and not against the College or its Board members. Marchelos does

This principle parallels the rule earlier adopted by this court in a case involving allegations that an employee was transferred because of racially motivated complaints. *London v. Florida Department of Health & Rehabilitative Services,* 448 F.2d 655 (5th Cir. 1971), *cert. denied,* 406 U.S. 929, 92 S.Ct. 1765, 32 L.Ed.2d 131 (1972). The district court in *London* held that the plaintiff's rights were not violated, because the board that actually made the transfer decision was not racially motivated. We disapproved that reasoning, stating:

> It is much too superfiicial to reason that even though some of the complaints registered against plaintiff were racially motivated, London's rights were not impaired since the Welfare Board was not so motivated. Whatever the conscious motivations of the individual members of the Board, its decision to transfer London could remain discriminatory if founded upon testimony or evidence which was tainted by racial prejudice.

Id. at 657.[15]

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not challenge the judgment in this respect. Our opinion, therefore, considers only the liability of the individual defendant Shepack.

We intimate no opinion concerning what the result should be, as a matter of law, if the facts established that the Board independently reached the decision to discharge Marchelos separated from and uninfluenced either by Shepack's recommendations or by the charges brought by him. This case does not present a situation in which charges were initiated by an illegally motivated person but the authority who made the decision had neither illegal motive nor illegal influence, and we intimate no opinion concerning such a case.

15. *Cf. Johnson v. Duffy,* 588 F.2d 740, 743-44 (9th Cir. 1978); *Allen v. Autauga County Bd. of Educ.,* 685 F.2d 1302, 1304 (11th Cir. 1982); *Hickman v. Valley Local School Dist. Bd. of Educ.,* 619 F.2d 606, 610 (6th Cir. 1980); *Flores v. Pierce,* 617 F.2d 1386, 1390-91 (9th Cir.), *cert. denied,* 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980); *Simineo v. School Dist. No. 16,* 594 F.2d 1353, 1356-57 (10th Cir. 1979).

The evidence was sufficient to support the conclusion that all four of the charges Shepack lodged against Marchelos were pretexts to conceal his improper motive. Even though Marchelos admitted that he made three of the anonymous night-time calls, the jury concluded within reason that this conduct, together with the other episodes, would not have resulted in the discharge of a dean, save for the existence of a secret animus. The evidence also supports the jury's finding that defendants failed to establish that they would have discharged Marchelos even in the absence of his protected activity.

[12] The defendants' contention that Shepack is absolutely immune to damages because his role in the Marchelos case was that of a prosecutor is spun from thread too thin to hold the weight put on it. Even if persons other than public prosecutors can claim prosecutorial immunity (a suggestion of dubious substance but one that we need not here finally weigh), Shepack was not a prosecutor in name or in fact. He was the college president, and the jury found that he was the principal actor in causing Marchelos' discharge.[16]

We, therefore, affirm the judgment awarding damages to Marchelos against Shepack.

B.

(Part III B was prepared by Circuit Judge JOLLY. Circuit Judge GARWOOD concurs. Circuit Judge ALVIN B. RUBIN dissents for reasons assigned below.)

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16. In *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968), the Seventh Circuit rejected a claim of absolute immunity for a school superintendent, saying, "To hold defendants absolutely immune from this type of suit would frustrate the very purpose of Section 1983."

[13] As we have noted, the district court denied reinstatement to Marchelos, reasoning that Marchelos had no security interest in his job because he had no reasonable expectation of continued employment beyond the expiration of his contract on August 31, 1979. The district court erred in denying reinstatement on this basis. We therefore remand this case for redetermination of whether Marchelos should be reinstated to his position as a dean of El Paso Community College.

As this opinion explains, the illegality of Marchelos' discharge results from the infringement of his first amendment rights of speech and association. First amendment employment termination cases are unlike cases that arise out of transgressions of fourteenth amendment due process rights. In fourteenth amendment wrongful discharge cases, both rights and remedy depend upon the individual's having a property interest in his job. Here, however, Marchelos need not show a property interest in order to assert his constitutional rights to freedom of speech and freedom of association. The Supreme Court clearly articulated this proposition in *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and we need look no further than that case to see the error in the district court's denial of reinstatement:

> Doyle's claims under the first and fourteenth amendment are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever and had no constitutional right to a hearing prior to the decision not to rehire him, *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), he may nonetheless establish a claim to reinstatement

> if the decision not to rehire him was made by reason of his exercise of constitutionally protected first amendment freedoms. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

Id. at 283, 97 S.Ct. at 574, 50 L.Ed.2d at 481.

Under the *Mt.* Healthy analysis, once the plaintiff establishes that his discharge resulted from constitutionally impermissible motives, he is presumed to be entitled to reinstatement. Courts generally order reinstatement because they reasonably assume that in most cases the defendant would have continued to employ the plaintiff indefinitely if the plaintiff had not engaged in the objectionable but constitutionally protected conduct that led to his dismissal.

The right of reinstatement is not automatic and absolute, however. In unusual cases the defendant may show by a preponderance of the evidence that the plaintiff is not entitled to reinstatement as an appropriate remedy for his unlawful dismissal because his employment would have definitely terminated for some legitimate reason. If, for example, the defendant shows that the plaintiff's contract would not have been renewed at the and of the employment term for some economic, academic, administrative or policy reason, independent of reasons given for discharge, then the district court might be justified in denying reinstatement. The employee, of course, still would be entitled to monetary damages, at least in the amount of salary he would have earned during the time remaining on his contract. Reinstatement may not be an appropriate remedy because, as a practical matter, by the time the court must decide on an appropriate remedy, the contract term, which would not have been

renewed for independent and lawful reasons, may have expired. To award reinstatement under these circumstances would do more than remedy the constitutional wrong perpetrated on the employee; it would reward him solely for exercising his constitutional rights. The *Mt. Healthy* case itself counsels against awarding such windfalls to prevailing employee plaintiffs. In *Mt. Healthy,* the Court said the law should not "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at 286, 97 S.Ct. at 575, 50 L.Ed.2d at 483. Although the issue in *Mt. Healthy* was determining causation for the purpose of establishing substantive liability, the Court's reasoning perforce is equally applicable to the remedy context.[17] We do note that on the record before us the college made no showing that Marchelos' contract would not have been renewed irrespective of the reasons associated with his discharge, but we cannot preclude the possibility of its being raised on remand.

The defendant also may avoid having the equitable remedy of reinstatement imposed upon it by proving by a preponderance of the evidence that the plaintiff has engaged in misconduct so serious that even when balanced against the school's violation of first amendment rights, equity would not be served by requiring reinstatement. Stated differently, an employee's misconduct surrounding his dismissal, or subsequent to his dismissal, may be so unjustified or opprobrious that he is in no position to

17. Our decision in this part of the opinion relates only to the law of remedies. It does not, as Judge Rubin suggests, undermine the "but for" causation test set forth by the Supreme Court in *Mt. Healthy.* The causation analysis of *Mr. Healthy* applies only to determine substantive liability when dismissal is the result of dual motives.

demand equity. In evaluating the defendant's position, the court may focus on the degree to which his conduct may enterfere with effective job performance or working relationships within the institution, as well as on the nature of the misconduct itself.

This principle of allowing the employer to resist the equitable remedy of reinstatement on the basis of equity is consistent with prior first amendment cases that have stopped short of holding that an unconstitutionally discharged employee has an absolute right to reinstatement. *See Allen v. Autauga County Board of Education,* 685 F.2d 1302, 1305 (11th Cir. 1982). *Cf. Abbott v. Thetford,* 529 F.2d 695, 701 (5th Cir. 1976) (reinstatement is an equitable remedy). Indeed, the principle is one firmly established in the law pertaining to wrongful discharge. *See St. John v. Employment Development Department,* 642 F.2d 273 (9th Cir. 1981) (employee's arguably disloyal conduct justified transferring her to another department); *Meyers v. I.T.T. Diversified Credit Corporation,* 527 F.Supp. 1064 (E.D. Mo. 1981) (lingering hostilities and fact that job had been contracted out to another company justified denial of reinstatement). *N.L.R.B. v. Jacob v. Decker & Sons,* 636 F.2d 129, 132 (5th Cir. 1981) (employee convicted of a felony); *N.L.R.B. v. E-Systems, Inc.,* 642 F.2d 118, 122 (5th Cir. 1981) (employee impulsively vandalized property). We emphasize, however, that the court should deny reinstatement in a first amendment wrongful discharge case on the basis of equity only in exceptional circumstances. That reinstatement might have "disturbing consequences," *Sterzing v. Ft. Bend Independent School Dist.,* 496 F.2d 92, 93 (5th Cir. 1974), "revive old antagonisms," *Abbott,* 529 F.2d at 701, or "breed difficult working condi-

tions," *Allen,* 685 F.2d at 1305 usually is not enough, nor specific enough, to outweigh the important first amendment policies that reinstatement serves. At some point, however, the probable adverse consequences of reinstatement can weigh so heavily that they counsel the court against imposing this preferred remedy.

We recognize a factor in this case that may, on remand, affect the district court's determination of Marchelos' right to reinstatement. The record shows that Marchelos engaged in serious misconduct by placing anonymous telephone calls to the residence of the president of the college. Marchelos admitted placing three of these calls--those that the police, using electronic equipment, traced directly to him. Although no independent evidence traces other calls to Marchelos, the record shows that over a period of ten weeks Shepack and his family were harassed by a series of anonymous telephone calls, often between 1:00 a.m. and 4:00 a.m., similar to the three Marchelos must admit he made. Such behavior seems to us to have been totally unjustified as a response, if that is what we are to take it to be, to Shepack's harassment of Marchelos. Marchelos does not attempt to justify this aberrant conduct, which appears at best to show imbalanced judgment. The conduct is all the more serious considering that Marchelos was employed by the college in a high-level position, specifically as a dean with major responsibilities. We do not now evaluate this conduct, except to note that such misuse of the telephone may be the basis for civil lawsuits and even of criminal charges.

Considering these facts, the district court, and not this court, properly should weigh all the factors relevant to the remedy ultimately chosen. *Sterzing v. Ft. Bend Inde-*

pendent School District, 496 F.2d 92, 93 (5th Cir. 1974). In the light of the evidence relating to the telephone calls, the college's claim that reinstatement is inappropriate in this case is not frivolous, and unlike Judge Rubin, we would not decide as a matter of law that the college must reinstate Marchelos despite his behavior. The district court may conclude that Marchelos' conduct was, for some reason unknown to us, more justifiable or excusable than it appears, was not taken seriously by those concerned, or would not undermine others' respect for his judgment or undermine his effectiveness in working in the administration of the college. Applying the appropriate legal standards, the district court should consider the facts relating to Marchelos' right to reinstatement in the light of our comments here to determine whether it is an appropriate remedy in this case. The district court may take new evidence, or may decide the issue from the record before it. This, of course, we leave to the district court and its discretion.[18]

IV.

Separate interrogatories were submitted to the jury on Castanon's two claims. On each claim the jury was asked

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18. Our holding in this case is entirely consistent with that of the Eleventh Circuit in *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302 (11th Cir. 1982), cited by both the majority and the dissent in this case. *Allen* recognized that in exceptional cases reinstatement might be inappropriate, but held that the case before it did not present such exceptional circumstances. *Id.* at 1205. In *Allen*, unlike the present case, the district court reviewed the reinstatement issue under appropriate legal standards and denied reinstatement because it would "breed difficult working conditions." The Eleventh Circuit Court of Appeals held that reason to be insufficient as a matter of law. *Id.* We do not adopt or reject that holding, but wish merely to allow the district court to evaluate the facts in this case initially, applying the correct legal standards, to determine the appropriateness of reinstating Marchelos.

whether Castanon's protected activity was a substantial or motivating factor in the defendants' actions toward her. On the first claim the interrogatory and the answer were:

> Do you find, from a preponderance of the evidence, that the associational activity of Isela Castanon was a substantial or motivating factor in the decision of the defendants to cancel the educational assistance courses for which Ms. Castanon was responsible?
>
> Answer: No.

On the second claim the interrogatory and the answer were:

> Do you find, from a preponderance of the evidence, that the filing of grievances on her own behalf, or processing or attempting to process grievances on behalf of others, substantially or materially motivated the defendants, or any one or more of the defendants, to retaliate against Isela Castanon?
>
> Answer: Yes.

The jury found only that Shepack was improperly motivated. It was then asked to decide whether the same decision would have been made in the absence of Castanon's protected activity only with regard to retaliation for her associational activity:

> Do you find from a preponderance of the evidence that the same decision as to Isela Castanon's reassignment would have been reached in the absence of her associational activities?

Not surprisingly, having found that Castanon's reassignment had not been substantially motivated by her first

amendment activity, the jury answered that question "Yes." No similar interrogatory was asked on the claim of retaliation for filing grievances. The defendants did not object to the absence of such an interrogatory.

[14] The jury assessed no damages for Castanon's reassignment, but it assessed $2,500 for emotional distress caused by the retaliation against her for filing grievances. The district court's only reason for denying Castanon judgment for the $2,500 damages was that the jury's answer to the "same decision anyway" question on the reassignment claim barred the award of damages on the retaliation claim as a matter of law. That decision did not fulfill the court's obligation to give full effect to all of the jury's verdict if this can be done fairly and logically, in view of the evidence. *See Miller v. Royal Netherlands Steamship Co.*, 508 F.2d 1103, 1106-07 (5th Cir. 1975).

The "same decision anyway" interrogatory on which the district court relied to deny judgment to Castanon referred only to her "reassignment." "Reassignment" was the term that the defendants themselves used to refer to the cancellation of the courses Castanon had designed and her assignment to teach a different set of courses. The alleged retaliation for her participation in grievance activities was factually different—being scheduled to teach the "early-early" and the "late night" classes, as Castanon described it. Her claim was that the burdensome scheduling was undertaken to retaliate for her role in filing grievances and assisting with grievances. The evidence was uncontroverted that the first grievance in which Castanon played any role was in protest of her reassignment. A finding that the reassignment was based on valid reasons is in no way inconsistent with a finding that the defend-

ants thereafter retaliated against her for filing and processing grievances concerning the reassignment.

[15] The defendants argue that judgment could not properly be entered on the jury's verdict because the special interrogatory on "retaliation" asked the jury to make a conclusion of law rather than a finding of fact, and that the error in this regard was compounded by the district court's failure to define "retaliation" in its instructions to the jury. On this point, "the complete answer is that neither objection is subject to review by this Court because counsel made no timely objection to such instruction in the court below as positively required by Rule 51 of the Federal Rules of Civil Procedure." *Little v. Green,* 428 F.2d 1061, 1069-70 (5th Cir. 1970), *cert. denied,* 400 U.S. 964, 91 S.Ct. 366, 27 L.Ed.2d 384 (1970). The defendants did not object in the district court to the submission to the jury of the "retaliation" issue, to the form of the special interrogatory on that issue, or to the absence of an instruction defining retaliation. Having failed to raise this issue below, the defendants cannot raise it here unless the district court committed an error "so fundamental as to result in a miscarriage of justice." *Whiting v. Jackson State University,* 616 F.2d 116, 126 (5th Cir. 1980). That standard is not met here.

The district court should have rendered judgment in favor of Castanon for $2,500. Whether those damages should be assessed against Shepack or the College must be resolved by the district court on remand. The jury found that only Shepack was improperly motivated against Castanon, but, in assessing damages, it found that $2,500 "would compensate [her] for the emotional distress sustained as a result of the actions of the EL PASO COUNTY COMMUNITY COLLEGE with regard to her filing

and processing of grievances." (Emphasis in original.) (The defendants made no objection to the form in which this special interrogatory was presented to the jury.) Read together, these findings may suggest that Shepack acted as an agent of the College when he violated Castanon's rights. Interpretation of the jury's findings, however, is reserved in first instance for the trial court. Moreover, as the charge was not objected to in this respect, if the jury findings are incomplete on this question, the district court may make appropriate findings. Fed. R. Civ. P. 49. Because that court considered damages against all defendants precluded by the jury's findings, it has not yet had an opportunity to address this question, as it will on remand.

V.

In denying the application for fees and expenses, the district court made no findings on the number of hours reasonably spent in representing the plaintiffs on the claims they won or on the hourly rate that would be reasonable compensation for counsel's efforts. The court did not address at all the extent to which evidence relevant to the losing claims was also reasonably necessary to presentation of the successful claims. The reasons the district court gave for awarding just $5,000 were that only Marchelos was a prevailing party and the plaintiffs' counsel had spent more time than the court believed necessary.

The conclusion that only one of the plaintiffs was a prevailing party in the action was based upon the dismissal of PACE's claim and the denial of judgment to Castanon. Because those two rulings are reversed, the award of attorney's fees must be vacated and remanded for reconsideration. Although PACE's right to recover

fees must await the outcome of a trial of its claim, fees should be awarded for representation of Castanon on the claim that she won.

Apart from the "prevailing party" question, the district court must reconsider its decision because its findings are inadequate under the controlling precedent of this circuit. They consist of little more than a mechanical recitation of the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The court gave no indication of how many hours it believed were reasonably expended in representing Marchelos, nor any hint of what it believed to be a reasonable hourly fee for counsel's services. In gave no intimation why it denied reimbursement of expenses.

The Supreme Court emphasized the importance of clear explanation of the calculation of attorneys' fees in *Hensley v. Eckerhart*, ____U.S.____, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The Court specifically urged articulation of the number of hours found to have been reasonably expended and the reasonable rate used as multiplier. When efforts have succeeded on some issues but not on others, "[t]he result is what matters." *Id.* 103 S.Ct. at 1940. The overall level of success is paramount in determining the reasonableness of time expended, not simply the proportion of asserted claims won to asserted claims lost.

This court has repeatedly and consistently vacated fee awards that are as vaguely explained as this one. We have held that district courts must do more than recite the twelve *Johnson* factors and announce a fee. In *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 582-83 (5th Cir. 1980), we gave the district court a specific framework of analysis it should follow in applying the *Johnson* factors. The purpose of that analysis is to make

certain that the basis of the district court's award is expressed, so that meaningful appellate review is possible.

Accordingly, we vacate the award of fees and remand for reconsideration and proper findings.

VI.

On cross-appeal the defendants raise two additional issues. The first is a contention that the trial court did not give the defendants adequate time to present their defense. The second is an argument that the district court improperly granted an injunction prohibiting The College and "its officers, agents and employees from retaliating or discriminating against the Plaintiffs or any other employees due to their membership or association with . . . [PACE] or any other lawful association of its employees."

The district court consistently applied pressure on both parties to shorten the trial. The trial judge told counsel, however, that he did not intend to keep either party from presenting any witnesses; he simply wanted them to move as fast as they could. According to the defendants-appellees' brief, defense counsel objected to the first specific schedule announced for presentation of the parties' cases. The court did not enforce that schedule against either party. Later the same day, the court altered the schedule, partly in response to the concern expressed by defense counsel. Defense counsel did not object to the new schedule. Later, after completing the questioning of his final witness, defense counsel gave no indication to the court that he had other witnesses that he would call if allowed more time, or that the defense would be prejudiced if required to rest. On the contrary, he simply stated, "We have nothing further. We rest, your Honor." Counsel said

nothing else on this score until after the jury returned its verdict. Only then did he declare that the defendants had other witnesses they had wanted to call, and only then did he make an offer of proof.[19]

[16] Rule 46 of the Federal Rules of Civil Procedure allows no appeal unless the "party, at the time the ruling or order of the court is made or sought, makes known to the court . . . his objection to the action of the court and the grounds therefor. . . ." *See Colonial Refrigerated Transportation Inc. v. Mitchell,* 403 F.2d 541, 551-52 (5th Cir. 1968); *Golden Bear Distributing Systems v. Chase Revel, Inc.,* 708 F.2d 944, 951 n. 5 (5th Cir. 1983). Rule 103(a) of the Federal Rules of Evidence requires both timely objection and an offer of proof as prerequisite to appeal from any ruling that has the effect of excluding evidence. In this case, objection and an offer of proof could be timely only before the jury retired, for the purpose of the rules requiring these procedures is to inform the trial judge of the substance of what counsel wishes to prove, at a time when the judge can still reconsider his ruling and make any changes deemed advisable. *Colonial Refrigerated Transportation,* 403 F.2d at 552.[20] The argument that the defendants were denied

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19. Defense counsel said that, absent the time limitation, he would have called The College's Vice-President to testify about Marchelos' misuse of leave time and the order not to assign summer overloads; a Mr. Green (apparently a personnel employee) to testify about the misuse of leave time; and two officials at another college to testify that after his discharge, Marchelos told them he had left El Paso Community College by mutual agreement due to philosophical differences. This evidence would only have supported the basis for the Board's action; it would not have controverted the evidence that the discharge would not have occurred absent Marchelos' first amendment activities.

20. *Accord United States v. Lara-Hernandez,* 588 F.2d 272, 273-74 (9th Cir. 1978).

adequate time to present their case is, therefore, procedurally barred.

VII.

The defendants attack the injunction on three grounds. They argue, first, that it is too broad and not sufficiently specific, second, that it is not supported either by findings of fact or record evidence, and, third, that, because Shepack was the only defendant found to have violated the plaintiffs' rights, the injunction cannot properly bind The College and its officers, agents, and employees.

[17, 18] The standards requiring specificity in injunctions are fully met here. These rules do not require "unwieldy" specificity, but only that the injunction "be framed so that those enjoined will know what conduct the court has prohibited." *Meyer v. Brown & Root Construction Co.*, 661 F.2d 369, 373 (5th Cir. 1981). The present injunction prohibits retaliation or discrimination against employees due to their membership or association with PACE or other lawful employee associations. It is difficult to understand how the defendants could have legitimate difficulty understanding what they are forbidden to do, or to imagine how the injunction could be more specific without attempting to catalog every conceivable means by which an employer might retaliate or discriminate against an employee.

Nor is the injunction too broad, in the sense of unduly prohibiting conduct dissimilar to the violations established. The district court has "broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly

be anticipated from the defendant's conduct in the past." *NLRB v. Express Publishing Co.*, 312 U.S. 426, 435, 61 S.Ct. 693, 699, 85 L.Ed. 930, 936 (1941).

The district court made no express findings of fact in support of an injunction, as required by Federal Rule of Civil Procedure 65(d). While a court's failure to do so does not require that the injunction be reversed or vacated, particularly when there is a jury verdict on which an injunction can properly be based, the absence of findings does require some conjecture on our part. We must "examin[e] the record to determine if . . . sufficient evidence supports the issuance of injunctive relief." *Sampson v. Murray*, 415 U.S. 61, 86 n. 58, 94 S.Ct. 937, 951 n. 58, 39 L.Ed.2d 166, 185 n. 58 (1974).

[19] Insofar as the injunction forbids Shepack to take actions against Castanon, the reasons for its issuance are made patent by the jury's findings. There were two jury findings of retaliation by Shepack, supported by ample evidence of Shepack's general hositility and tendency to retaliate. The retaliation against Castanon was continuing as of the date of trial. The trial court could properly conclude that, in the absence of an injunction, Shepack would continue to retaliate against her.

Considering that Marchelos was denied reinstatement, we cannot infer with confidence the basis for granting him injunctive relief.

[20, 21] The injunction applies also to actions against members of PACE who were not parties in this suit. Intrusion of federal courts into state agencies should extend no further than necessary to protect federal rights of the parties. An injunction, however, is not necessarily

made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled. *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 374 (5th Cir. 1981); *Gregory v. Litton Systems, Inc.*, 472 F.2d 631, 633-34 (9th Cir. 1972). Although PACE's claim was dismissed before trial, that organization is an inevitable beneficiary of any injunction protecting prevailing plaintiffs' right to associate with it. Without a statement of reasons, however, we cannot infer why protecting PACE's other members was necessary to relieve Castanon. Having dismissed PACE's claim, the district court could not have concluded that protecting all of the organization's members was necessary to grant it full relief as a prevailing party. Whether such injunctive relief should be afforded must await the trial of the PACE claims.

[22] The injunction was framed to bind not only Shepack but also The College and its other subordinates. It was within the district court's discretion to frame an injunction so that it applied to persons other than Shepack. Rule 65(d) of the Federal Rules of Civil Procedure authorizes injunctions that are binding not only upon the parties to the action but also upon "their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." This rule reflects the longstanding rule of equity that an injunction can bind not just parties "but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control.

In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors. . . ." *Regal Knitwear Co. v. NLRB,* 324 U.S. 9, 14, 65 S.Ct. 478, 481, 89 L.Ed. 661 (1945).

We cannot perceive the basis for binding The College and others when the jury found that only Shepack was improperly motivated in his actions toward Marchelos and Castanon. Shepack is an agent of The College, not its deus ex machina. The district court might have concluded that The College's trustees merely rubber-stamped Shepack's recommendations after perfunctory hearings, and was therefore properly subject to the injunction as being "in active concert or participation" with him; without a statement of reasons for the injunction, however, we are unable to identify this as the basis for an order binding The College.

We must therefore vacate the injunction as it applies to The College and to persons other than Shepack and as it protects persons other than Castanon. Thus confined, reasons for the injunction are made patent by the jury's findings. A broader injunction may be appropriate if accompanied by a statement of reasons, particularly if PACE prevails against Shepack or The College on remand.

For these reasons the judgment is AFFIRMED insofar as it awards damages to Marchelos. It is REVERSED insofar as it denies damages to Castanon and dismisses the PACE action; and VACATED in its award of attorneys' fees and, in part, in its issuance of an injunction. In all other respects, the case is REMANDED for further proceedings consistent with this opinion.

ALVIN B. RUBIN, Circuit Judge, dissenting from Part III B.

Both reason and precedent compel me to dissent from the remand of George Marchelos' already amply proved claim to reinstatement, which my brethren attempt to explain in part IIIB above. A state employer may escape its duty to rehire a person discharged in violation of the first amendment, they say, if the employer shows either "that it would not have reinstated [the employee] irrespective of all reasons given for the discharge which the jury rejected," or that equity and fairness would be disserved by the remedy. This analysis is contrary to Supreme Court precedent and the established rule of this circuit. As mere reading of the test demonstrates, it substitutes an intricate and confusing instruction for the Supreme Court's lucid one. The test would permit the University to deny the victim of its wrongdoing the only remedy that can make him whole by invoking equity in the cause of injustice.

The standard for awarding reinstatement announced by the Supreme Court in *Mt. Healthy* is succinct and clear: once the plaintiff establishes that his constitutionally protected conduct was a substantial or motivating factor in the defendant's decision to fire him, the defendant must reinstate him unless it establishes "that it would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy,* 429 U.S. at 287, 97 S.Ct. at 576, 50 L.Ed.2d at 484; *Bueno v. City of Donna,* 714 F.2d 484, 497 & n. 1 (5th Cir. 1983) (Rubin, J., concurring specially). The "irrespective-of-all-reasons" defense appears to me either to stray from the *Mt. Healthy* test or to muddle its clarity.

infinitely valuable, albeit intangible, status, reputation, and psychological benefits that, in our society, attend prestigious employment. Reinstatement is also essential to deter retaliatory discharges and to eliminate the chilling effect such a discharge may exert on other employees whose desire to speak out against the ruling powers is stilled by fear of a similar fate. For these reasons, the Eleventh Circuit recently adopted what has hitherto been the rule of our court and reversed a denial of reinstatement specifically justified by the district court as necessary to avoid inequity. *Allen v. Autauga County Board of Education,* 685 F.2d 1302, 1305-06 (11th Cir. 1982). Citing our own precedent in *Sterzing* and a number of other Fifth Circuit cases, it said, "[r]einstatement is a basic element of the appropriate remedy in wrongful employee discharge cases and, except in extraordinary ones, is required."

It is possible to conceive of a truly extraordinary case in which reinstatement should be denied. Our record on appeal, read fairly, simply does not present such a case. Marchelos admitted having made three late-night calls in a single night. He explained that he had intended to "tell off" Shepack but had lost his nerve each time. The jury heard this and other evidence of the late-night calls; indeed, it heard that the College had discharged Marchelos after the Board of Trustees had sustained Shepack's charge that Marchelos had made the annoyance calls. Nevertheless, the jury found that the decision to dismiss Marchelos would not have been reached in the absence of his constitutionally protected activities.[1] The jury

1. Thus, the jury's findings imply that the incident "was not taken seriously by those concerned." Under these circumstances, reinstatement is compelled even under the analysis set forth in part IIIB.

apparently concluded that Shepack would not ordinarily seek to fire a college dean who displayed what might merely be emotional instability under stress. The majority calls Marchelos' conduct "the basis for civil lawsuits and even of criminal charges." His behavior seems to me more aptly to demonstrate a need for counseling. A college president not bent on vindictiveness would probably suggest to a dean who demonstrated such a reaction to pressure that he take a rest and consult a doctor. It is therefore neither unfair nor inequitable to reinstate the dean and thus to make him whole in the only way that the constitutional wrong done him can be repaired.

The wrong done Marchelos by remanding the case for a rehearing would alone warrant dissent. The majority's departure from the *Mt. Healthy* standard and our own precedent so damage the protection of constitutional rights that they mandate my dissent from part IIIB of the opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

NO. EP-80-CA-225

PROFESSIONAL ASSOCIATION OF
COLLEGE EDUCATORS, et al.

v.

EL PASO COMMUNITY COLLEGE, et al.

(Filed January 29, 1982)

JUDGMENT

On November 16, 1981 to November 20, 1981, this cause was tried to a jury on Special Issues in El Paso, Texas, and the Court, having carefully examined the post-trial briefs submitted by the parties, enters the following Judgment:

(a) IT IS ADJUDGED that GEORGE MARCHELOS recover judgment against ROBERT SHEPACK in the amount of $7,500, in accordance with the jury verdict.

(b) IT IS ADJUDGED that JAMES SEMONES recover nothing from the Defendants, in accordance with the jury verdict.

(c) IT IS ADJUDGED that LEONARD BAILES, JR., recover nothing from the Defendants, in accordance with the jury verdict.

(d) IT IS ADJUDGED that ISELA CASTENON recover nothing from the Defendants, in accordance with the jury verdict. The Court would note that the jury, as regards ISELA CASTENON, found that the filing of grievances on behalf of herself or others, substantially motivated ROBERT SHEPACK to retaliate against her. The jury also found that the same decision as to ISELA CASTENON's reassignment would have been reached in the absence of such associational activities. Therefore, as a matter of law, ISELA CASTENON is precluded from recovering damages as a result of the retaliative action by Defendant SHEPACK. *Mr. Healthy v. Doyle,* 429 U.S. 274 (1977).

(e) IT IS ADJUDGED that MARY ELLEN VARGAS recover nothing from the Defendants, in accordance with the jury verdict.

IT IS ORDERED that ROBERT E. HALL recover attorney's fees from Defendant SHEPACK in the amount of $5,000. The Court finds that Mr. Hall prevailed in the case of one of five plaintiffs and should recover attorney's fees only for that Plaintiff. Additionally, after careful analysis of the criteria established in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974),[1] the Court makes the following findings:

(1) Plaintiffs' attorney used a substantial amount more time and labor than the case required. This Court

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1. These criteria are: (1) Time and labor required; (2) the novelty and difficulty of the case; (3) requisite skill of the attorney; (4) preclusion of other employment due to acceptance of the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the cause; (11) the nature of the relationship between the attorney and the client; and (12) awards in similar cases.

has been submerged with an inordinate amount of briefing, many times on redundant points.

(2) The amount involved in the case and the results obtained indicate that substantially fewer hours of work could or should have been performed.

(3) The claims and damages of several Plaintiffs were extremely speculative, and quite possibly should not have been the subject of legal redress.

(4) The attorneys for Plaintiffs were not precluded from accepting other work during the pendency of this litigation.

IT IS ORDERED that the attorneys of record for Defendants recover no attorneys' fees in this cause. The Court finds that while the claims of Plaintiffs SEMONES, BAILES, JR., CASTENON, and VARGAS were speculative, they were not frivolous. Accordingly, Defendants' counterclaim for attorneys' fees is, in all respects, DENIED.

Upon examination of the administrative record in this cause, the Court finds that Plaintiff MARCHELOS was precluded from presenting evidence that his potential termination was in retaliation for the exercise of his constitutionally protected First Amendment rights. Accordingly, he was not afforded a meaningful opportunity to be heard in his own defense.

IT IS ORDERED that the costs attributable to Plaintiff MARCHELOS' action be assessed against Defendant SHEPACK. IT IS ORDERED that the costs attributable to the actions of the remaining Plaintiffs be assessed against such Plaintiffs.

IT IS ORDERED that a Permanent Injunction issue prohibiting Defendant EL PASO COMMUNITY COLLEGE DISTRICT, its officers, agents and employees from retaliating or discriminating against the Plaintiffs or any other employees due to their membership or association with the Professional Association of College Educators or any other lawful association of its employees.

SIGNED and ENTERED this 29th day of January, 1982.

/s/ LUCIUS D. BUNTON
Lucius D. Bunton
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

NO. EP-80-CA-225

PROFESSIONAL ASSOCIATION OF
COLLEGE EDUCATORS, ET AL

v.

EL PASO COMMUNITY COLLEGE
DISTRICT, ET AL

(Filed November 20, 1981)

VERDICT FORM

GEORGE MARCHELOS

1. Do you find from a preponderance of the evidence that a substantial or motivating factor for the discharge of George Marchelos was his associational activity?

Answer "Yes" or "No."

Answer: Yes

2. If you have answered Question 1 "yes", then state which of the Defendant(s) was/were so motivated.

(a) Robert Shepack	√ yes	_____ no
(b) Tom Prendergast	_____ yes	√ no
(c) Ted Karam	_____ yes	√ no
(d) Arturo Lightbourn	_____ yes	√ no
(e) Jeanene K. Smith	_____ yes	√ no
(f) Eleanor Goodman	_____ yes	√ no
(g) E. A. Aguilar	_____ yes	√ no
(h) Ramon Grado, Jr.	_____ yes	√ no

2(a) Do you find from a preponderance of the evidence that the same decision as to Marchelos' dismissal would have been reached in the absence of his associational activities?

Answer "Yes" or "No." No

3. What sum of money, if any, do you find, from a preponderance of the evidence, would compensate George Marchelos for the emotional distress, injury to his reputation and lost earnings which he sustained as a result of his discharge by the El Paso County Community College District?

Answer in dollars and cents, or none. $7,500

JAMES SEMONES

1. Do you find from a preponderance of the evidence that the associational activity of James Semones was a substantial or motivating factor in the decision to withhold his "overload" assignment?

Answer "Yes" or "No."

Answer: No

2. If you have answered Question 1 "yes", then state which of the Defendant(s) was/were so motivated.

(a) Robert Shepack _____ yes _____ no

(b) Tom Prendergast _____ yes _____ no

(c) Ted Karam _____ yes _____ no

(d) Arturo Lightbourn _____ yes _____ no

(e) Jeanene K. Smith _____ yes _____ no

(f) Eleanor Goodman _____ yes _____ no

(g) E. A. Aguilar _____ yes _____ no

(h) Ramon Grado, Jr. _____ yes _____ no

2(a) Do you find from a preponderance of the evidence that the same decision as to James Semones summer overload teaching assignment would have been reached in the absence of his associational activities?

Answer "Yes" or "No." Yes

3. What sum of money, if any, if paid now, do you find, from a preponderance of the evidence, would compensate James Semones for the emotional distress, mental anguish and lost earnings which he sustained as a result of the denial of the "overload" assignment during the summer session of 1979?

Answer in dollars and cents, or none. $ None

LEONARD BAILES

1. Do you find from a preponderance of the evidence, that the associational activity of Leonard Bailes was a substantial or motivating factor in the decision to remove Leonard Bailes as Discipline Coordinator?

Answer "Yes" or "No."

Answer: No

2. If you have answered Question 1 "yes", then state which of the individual Defendant(s) was/were so motivated.

(a) Robert Shepack	yes	no
(b) Tom Prendergast	yes	no
(c) Ted Karam	yes	no
(d) Arturo Lightbourn	yes	no
(e) Jeanene K. Smith	yes	no

(f) Eleanor Goodman	yes	no
(g) E. A. Aguilar	yes	no
(h) Ramon Grado, Jr.	yes	no

2(a) Do you find from a preponderance of the evidence that the same decision as to Leonard Bailes, Jr.'s removal as History Discipline Coordinator would have been reached in the absence of his associational activities?

Answer "Yes" or "No." Yes

3. What sum of money, if paid now, if any, do you find, from a preponderance of the evidence, would compensate Leonard Bailes for the damage to professional reputation and emotional distress which he sustained as a result of being removed from the position of Discipline Coordinator?

Answer in dollars and cents, or none. $ None

ISELA CASTANON

1. Do you find, from a preponderance of the evidence, that the associational activity of Isela Castanon was a substantial or motivating factor in the decision of the Defendants to cancel the educational assistance courses for which Ms. Castanon was responsible?

Answer "Yes" or "No."

Answer: No

2. If you have answered Question 1 "yes", then state which of the Defendant(s) was/were so motivated.

(a) Robert Shepack	yes	no
(b) Tom Prendergast	yes	no
(c) Ted Karam	yes	no
(d) Arturo Lightbourn	yes	no
(e) Jeanene K. Smith	yes	no
(f) Eleanor Goodman	yes	no
(g) E. A. Aguilar	yes	no
(h) Ramon Grado, Jr.	yes	no

3. What sum of money, if any, if paid now, do you find, from a preponderance of the evidence, would compensate Isela Castanon for the emotional distress and injury to her reputation she sustained as a result of the cancellation of the educational assistance courses for which she was responsible?

Answer in dollars and cents or none. $ None

4. Do you find, from a preponderance of the evidence, that the filing of grievances on her own behalf, or processing or attempting to process grievances on behalf of others, substantially or materially motivated the Defend-

ants, or any one or more of the Defendants, to retaliate against Isela Castanon?

Answer "Yes" or "No."

Answer: Yes

5. If you have answered Question 4 "yes", then state which of the individual Defendant(s) was/were so motivated.

(a) Robert Shepack	√ yes	____ no
(b) Tom Prendergast	____ yes	√ no
(c) Ted Karam	____ yes	√ no
(d) Arturo Lightbourn	____ yes	√ no
(e) Jeanene K. Smith	____ yes	√ no
(f) Eleanor Goodman	____ yes	√ no
(g) E. A. Aguilar	____ yes	√ no
(h) Ramon Grado, Jr.	____ yes	√ no

5(a) Do you find from a preponderance of the evidence that the same decision as to Isela Castanon's reassignment would have been reached in the absence of her associational activities?

Answer "Yes" or "No." Yes

If you have answered Question 4 "yes", answer Question 6.

6. What sum of money, if any, if paid now, do you find, from a preponderance of the evidence, would compensate Isela Castanon for the emotional distress which she sustained as a result of the actions of the El Paso County Community College with regard to her filing and processing of grievances?

Answer in dollars and cents, or none. $2500

MARY ELLEN VARGAS

1. Do you find, from a preponderance of the evidence, that the associational activity of Mary Ellen Vargas was a substantial or motivating factor in the decision not to continue the employment of Mary Ellen Vargas for the 1980-1981 school year?

Answer "Yes" or "No."

Answer: No

2. If you have answered Question 1 "yes", then state which of the Defendant(s) was/were so motivated.

(a) Robert Shepack _____ yes _____ no

(b) Tom Prendergast _____ yes _____ no

(c) Ted Karam _____ yes _____ no

(d) Arturo Lightbourn _____ yes _____ no

(e) Jeanene K. Smith	_____ yes	_____ no
(f) Eleanor Goodman	_____ yes	_____ no
(g) E. A. Aguilar	_____ yes	_____ no
(h) Ramon Grado, Jr.	_____ yes	_____ no

2(a) Do you find from a preponderance of the evidence that the same decision as to Mary Ellen Vargas' nonrenewal for the 1980-1981 school year would have been reached in the absence of her associational activities?

Answer "Yes" or "No." Yes

3. What sum of money, if any, if paid now, do you find, from a preponderance of the evidence, would compensate Mary Ellen Vargas for the emotional distress, injury to her reputation and lost earnings which she sustained as a result of her non-renewal by the El Paso County Community College District?

Answer in dollars and cents, or none. $ None

/s/ ROBERT MAYO
Foreperson

Date: 11-20-81